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No. 89-205.

In the

Supreme Court of the United States.

OCTOBER TERM, 1989.

ROBERT GUINEY,
PETITIONER,

v.

FRANCIS M. ROACHE,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Respondent's Brief in Opposition.

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Question Presented.

Whether the United States Court of Appeals for the First Circuit correctly held that Boston Police Department Rule 111, which rule establishes regulations for the random urinalysis drug testing of police officers who carry guns and interdict drugs, is constitutionally permissible under the Fourth Amendment.

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Respondent's Brief in Opposition.

The respondent, Francis M. Roache, as he is Police Commissioner for the City of Boston, Massachusetts, respectfully opposes the issuance of a writ of certiorari to the United States Court of Appeals for the First Circuit.

Statement of the Case.

The respondent, Francis M. Roache, was appointed as Police Commissioner for the City of Boston in February of 1985. In response to the growth in the national epidemic in the illicit trafficking and use of drugs, and the deleterious effect it was having on the Boston Police Department, the respondent promulgated Boston Police Department Rule 111 on April 24, 1986, to be effective June 21, 1986. See *Guiney* v. *Roache*, 654 F. Supp. 1287 (D. Mass. 1987) (wherein the text of Rule 111 and the evidence and procedural history of the action are included), *vacated*, 833 F.2d 1079 (1st Cir. 1987).

The petitioner, Robert Guiney, in his capacity as president of the Boston Police Patrolmen's Association, filed a complaint in the United States District Court for the District of Massachusetts seeking a declaratory judgment that the drug testing program promulgated by Rule 111 violated the Fourth and Fourteenth Amendments to the United States Constitution. After first invoking abstention, 654 F. Supp. 1287 (1987), *vacated*, 833 F.2d 1079 (1st Cir. 1987), the district court held that portion of Rule 111 which provided for random drug testing was violative of the Fourth Amendment. 686 F. Supp. 956 (D. Mass. 1988). Subsequently, the First Circuit Court of Appeals vacated the ruling of the District Court. The Appeals Court held that, to the extent the drug testing program applies to police officers who carry guns and interdict drugs, the program is constitutional. Since the Department rule also included its civilian employees, the case was remanded to the District Court to clarify the rationale for including employees who may not carry guns and interdict drugs. 873 F.2d 1557 (1st Cir. 1989). On remand, the respondent amended Rule 111 so that it applies only to sworn police officers and not to civilian personnel.

Argument.

I. There Is No Conflict Between the Decision Below and Previous Decisions of This Court.

The First Circuit Court of Appeals correctly held that the random drug testing program of the Boston Police Department is permissible under the Fourth Amendment. It is critical to note that such drug testing program is not designed to serve the ordinary needs of law enforcement but is promulgated by the government, as employer, to detect and deter drug usage among its police officer employees. *National Treasury Employees Union* v. *Von Raab*, U.S. , 109 S.Ct. 1384, 1386, 103 L.Ed.2d 685 (1989) (NTEU).

In determining the reasonableness of non-criminal, workplace searches under the Fourth Amendment in the public employment setting the Court plurality in *O'Connor* v. *Ortega*, 480 U.S. 709, 107 S.Ct. 1492 (1987) held "that public employer intrusions on the constitutionally protected privacy interests of government employees for non-investigatory, work-related purposes, as well as for investigations of work related misconduct, should be judged by the standard of *reasonableness under all the circumstances*." *Id.* at 1502 (emphasis added).

The Court plurality further found that the intrusion must be reasonable at its inception and in its scope. *Id.* at 1503. The Court did not reach the issue of whether individualized suspicion of misconduct is an essential element of the above stated standard of reasonableness. *Id.* at 1503. However, the Court majority did recognize that "[i]n the case of searches conducted by a public employer, we must balance the invasion of the employee's legitimate expectations of privacy against the government's need for supervision, control and the efficient operation of the workplace." *Id.* at 1499.

The issue of whether drug testing must be based upon individualized suspicion that an employee is using drugs was recently addressed in the companion cases of *Skinner* v. *Railway Labor Executives' Association*, U.S. , 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) (RLEA) and *National Treasury Employees Union* v. *Von Raab*, U.S. , 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989). The Court held that the public interest must be balanced against the individual's privacy concerns implicated by the drug testing to determine whether a warrant, or probable cause or some level of individualized suspicion is required in this particular context. *NTEU* v. *Von Raab*, 109 S.Ct. at 1386 citing *Skinner* v. *RLEA*, 109 S.Ct. at 1413-1414 (1989). The Court then held the drug testing programs in both cases to be reasonable in the absence of probable cause or individualized suspicion.

Justice Kennedy, writing the majority opinion in the *Von Raab* case, *supra*, addressed three factors which tipped the balance favor of allowing the government to drug test specific classes of employees. First, the Court looked at the compelling interest of the government in insuring that its front-line personnel, who are interdicting drugs and carrying firearms, are physically fit and have unimpeachable integrity and judgment. In light of the evidence demonstrating a national crisis in law enforcement caused by the smuggling of illicit narcotics, government concern outweighed the privacy interests of those front-line personnel. *Id.* at 1391.

Secondly, the Court viewed the purpose of the drug testing program more a deterrent to drug usage than as a vehicle to detect those persons using drugs. "The mere circumstance that all but a few of those tested are innocent does not impugn the program's validity. The [Custom] Service's program is designed to prevent the promotion of drug users as much as designed to detect those employees who use drugs" *Id.* at 1395.

Finally, the Court found the scope of the search was not unjustifiably intrusive on Fourth Amendment protections. "Where, as here, the possible harm against which the government seeks to guard is substantial, the need to prevent its occurrence furnishes ample justification for reasonable searches calculated to advance the government's goal." *Id.* at 1396.

The Supreme Court's analysis in *Von Raab, supra,* is applicable to the drug testing of Boston police officers. It is axiomatic that society has a compelling interest in a drug-free police department. The very essence of the job of a police officer is to prevent and combat criminal activity. When a police officer fails to report incidents of illicit drug use, or worse, when the officer himself uses illicit drugs, he places himself in league with the criminals he is sworn to apprehend. He is not morally, mentally or physically fit to perform the duties of a police officer. An officer who uses drugs is a criminal. Yet he is one who is empowered with a gun and a badge and the authority of the sovereign. The danger of that situation needs no elaboration.

There is also the compelling public interest in safety as those police officers targeted for drug testing carry guns, engage in high-speed pursuits and combat drug traffickers in streets and neighborhoods of the city. These police officers are also entrusted with the "most awesome and dangerous power that a democratic state possesses with respect to its residents . . . the power to use lethal force to arrest and detain them". *Policeman's Benevolent Association* v. *Washington*, 850 F.2d 133, 141 (3d Cir. 1988).

As in *Von Rabb, supra,* the aim of the drug testing program of the Boston Police Department is to deter drug usage among its officers as well as to detect it. The respondent submits that random drug testing is the only effective means to achieve its goal. In *Transit Workers' Union, Local 234* v. *SEPTA*, 678 F. Supp. 543 (E.D. Pa. 1988) the court upheld random drug

testing for several categories of workers, including police officers. After months of debate and conflicting concerns regarding the random aspect of the testing program the court appointed an independent expert to review the testing proposal and report to the court. The court found that testing based on individualized suspicion had not been enough to satisfy the needs of public safety. It also found that to be an effective deterrent, testing must be random, unannounced and done daily. *Id.* at 549. The reason that random testing is effective is because its aim is to detect chronic abusers rather than actual impairment. Drug abusers would be able to stay drug free for a period of time if the tests were announced in advance. As urinalysis tests only for recently ingested drugs, drug abusers would otherwise escape detection. *Id.* at 549. The *SEPTA* court held that although drug screening by urinalysis is a serious infringement on an individual's reasonable expectation of privacy, the urinalysis of SEPTA's operating employees is not so intrusive or unreasonable as to fail to withstand constitutional scrutiny. *Id.* at 548. See also *Harmon* v. *Thornburgh*, 878 F.2d 484, 489 (D.C. Cir. 1989) (Court allowed random testing after declining to draw distinction between random testing and testing after a particular event.); *Skinner, supra,* 109 S.Ct. 1407-1408 (Court noted a number of federal agencies have found random testing as the most effective means to effectuate their goals.)

The Boston Police Department's drug testing program, as promulgated by Rule 111, was drafted specifically to address concerns for privacy, accuracy and arbitrariness. The selection of personnel to be tested is completely random. A statistical protocol for selection will be developed which will be computerized. There will be no discretion involved and therefore, no arbitrariness in the manner of selection. See *Lovvorn* v. *Chattanooga*, 647 F.Supp. 875, 881 (E.D. Tenn. 1986) (the trial court noted the absence of standards for the methods of

conducting the tests. It would apparently permit random tests where the tests were not subject to "standardless discretion"). See also *Delaware* v. *Prouse*, 440 U.S. 648, 655, 99 S.Ct. 1391, 1396-1397 (1979) (where the concern was that there was too much discretion as to who, what, when, where and in what manner to conduct a search).

Personnel responsible for the collection of samples will be trained and will not observe an employee during urination, which takes place in a private stall. See *Mullholland* v. *Department of the Army*, 660 F. Supp. 1565, 1569, 1576 (E.D. Va. 1987). An optimum amount of confidentiality is maintained. *NTEU* v. *Von Raab*, 109 S.Ct. at 1394. There are confirmatory tests and the employee may independently test an aliquot portion of the sample. See *Banks* v. *Federal Aviation Administration*, 687 F.2d 92, 95 (5th Cir. 1982). The confirmation procedure utilizes a gas chromatography/mass spectrometry tests which is considered to be the most accurate technology available. See *Williams* v. *Secretary of the Navy*, 787 F.2d 552, 555 (Fed. Cir. 1986). A detailed chain of custody provides assurances against the mislabeling of a sample. See *Rushton* v. *Nebraska Public Power Dist.*, 653 F. Supp. 1510, 1526 (D. Neb. 1987). Rule 111 also provides that an advisory committee be set up which will include representatives from labor and this committee will consult and advise the Commissioner on the most effective and least intrustive methodology to implement. See *Transit Workers' Union, Local 234* v. *SEPTA*, 678 F. Supp. 543 (E.D. Pa. 1988). Further, Rule 111 provides for substantive due process rights by requiring that prior to the imposition of any discipline, the Department must first determine there to be just cause to find a knowing violation of drug ingestion. (Rule 111, section 12, as amended.) Further, Rule 111 is drug specific: that is it tests only for four specific drugs in the urine. This limits the intrusiveness of the search.

In light of the foregoing, the measures adopted in Rule 111 are reasonably related to the object of the search (i.e., deterring drug usage) and are not excessively intrusive. Therefore, the search is reasonable in its scope.

A search is reasonable in its scope when " 'the measures adopted are reasonably related to he objectives of the search and not excessively intrusive in light of . . . the nature of the [misconduct].' " *O'Connor* v. *Ortega*, 480 U.S. 709, 107 S.Ct. 1492, 1503 (1987), quoting *New Jersey* v. *T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 744 (1985).

The petitioner fails to appreciate that the drug testing program at issue involves the government acting as an employer rather than the government exercising its law enforcement function. That is why petitioner relies on *Schmerber* v. *California*, 384 U.S. 757 (1966) and *Winston* v. *Lee*, 470 U.S. 753 (1985) for the proposition that compelled bodily intrusions implicate the most personal and deep-rooted expectations of privacy. (Petition at 5.) Those cases dealt respectively with the exclusion of a compelled blood sample of the defendant as evidence in the defendant's criminal trial and the constitutionality of the surgical removal of a bullet from the chest of a suspected felon. In the instant action there is no possibility of criminal sanctions against the tested police officers. The goals of the government as well as the expectation of privacy of those employees subject to testing are different when the government acts as an employer rather than an enforcer of the law. As the Court stated in *Von Raab, supra*:

> Customs employees . . . who are required to carry firearms in the line of duty . . . have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test. Unlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should

> expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms. Because successful performance of their duties depends uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from the service personal information that bears directly on their fitness. While reasonable tests designed to elicit this information doubtless infringe some privacy expectations, we do not believe these expectations outweigh the Government's compelling interests in safety and in the integrity of our borders.

Id. at 1394.

The respondent, police commissioner, contends that the Constitution does not require a police officer first to be involved in an incident involving a car or a gun before an employer can administer urine testing, so that the random drug testing program is justified. The circumstances of employment must be viewed in determining the reasonableness of the search. *O'Connor* v. *Ortega,* 480 U.S. 709, 107 S.Ct. 1492, 1501 (1987).

II. Massachusetts Constitution, Article 14, Provides More Substantive Protections than the Fourth Amendment.

In further opposition to a writ of certiorari it is noteworthy that the petitioner has a state constitutional claim under the Massachusetts Constitution's Declaration of Rights, Article 14 which the petitioner may still choose to present to the Massachusetts Supreme Judicial Court should this Court affirm the decision of the First Circuit Court of Appeals. This is so because

Article 14, although nearly identical to the Fourth Amendment, has been held to give individuals more substantive protections than the Fourth Amendment. *Commonwealth* v. *Upton*, 394 Mass. 373, 476 N.E.2d 548, 556 (1985); *Commonwealth* v. *Trumble*, 396 Mass 81, 86, 483 N.E.2d 1102, 1105 (1985); *Horsemen's Benevolent and Protective Association, Inc.* v. *State Racing Commission*, 403 Mass. 692, 703, 532 N.E.2d 644, 650 (1989). In a predecessor decision to the instant action which dealt with the appropriateness of abstention, the First Circuit indicated "that the Massachusetts courts would likely approach an Article 14 challenge to Rule 111 in much the same way that a federal court would approach to challenge to Rule 111 under the Fourth Amendment." *Guiney* v. *Roache*, 833 F.2d 1079, 1082 (1st Cir. 1987). Such a forecast of the law proved correct as the Supreme Judicial Court applied the Fourth Amendment balancing test when determining the constitutionality of a drug testing program for jockeys under *Horsemen's Benevolent and Protective Association, Inc.* v. *State Racing Commission*, 403 Mass 692, 704, 532 N.E.2d 644, 651 (1989).

Although a consideration of the random drug testing program under Article 14 is likely to have the same result as an analysis under the Fourth Amendment it is respectfully brought to the attention of this Court that its determination of the present action is not necessarily the final determination as the petitioner has an independent state claim which he may choose to invoke in the Massachusetts Supreme Judicial Court.

Conclusion.

For all the foregoing reasons, the respondent opposes the petition for a writ of certiorari to the First Circuit Court of Appeals.

Respectfully submitted,

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